IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 1426 of 1998

With
LETTERS PATENT APPEAL NO. 1427 OF 1998
And
LETTERS PATENT APPEAL NO. 1428 OF 1998
And
LETTERS PATENT APPEAL NO. 1429 OF 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes : YES

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? No : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No : YES

5. Whether it is to be circulated to the Civil Judge? No :

HIGH COURT OF GUJARAT

Versus

KK PARMAR

Appearance:
MR SN SHELAT, ADDL. ADVOCATE GENERAL FOR MR SP HASURKAR for Appellant
MR MUKUL SINHA for Respondents No. 1 to 29
MRS KETTY A MEHTA for Respondent No. 30,31,32,33,34,35, 36,37,38,39,40,41,42,43

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE R.P.DHOLAKIA

Date of decision: 29.7.1999

C.A.V.COMMON JUDGEMENT

(Per : Panchal, J.)

All these appeals filed under Clause-15 of the Letters Patent are directed against common judgment rendered by the learned Single Judge in Special Civil Application No. 351/98 and Special Civil Application No. 1298/98, by which order of promotion dated January 31, 1998 in favour of respondents no.30 to 43 in Letters Patent Appeal No. 1426/98 is set aside and the High Court of Gujarat is directed to evolve fresh process of selection for the post of section officers in conformity with Rule-47 of the High Court of Gujarat (Recruitment and Conditions of Service of Staff) Rules, 1992, giving due weightage to all the three components of determination of merits as indicated in the judgment.

2. Letters Patent Appeal No.1426/98 is filed by the High Court of Gujarat against judgment rendered in Special Civil Application No. 351/98, which was filed by those Assistants who had cleared written test, but were not called for oral interview; whereas Letters Patent Appeal No.1427/98 is filed by the High Court of Gujarat against judgment rendered in Special Civil Application No.1298/98 which was filed by those Assistants who had appeared in the two tests- oral as well as written, but were not selected. Letters Patent Appeal No.1428/98, which is directed against judgment rendered in Special Civil Application No. 351/98,is filed by candidates whose selection to the post of Section Officer, is set aside by the learned Single Judge; whereas Letters Patent Appeal No.1429/98 is directed against judgment rendered in Special Civil Application No. 4298/98 whereby selection of the selected candidates is set aside by the learned Single Judge. All these appeals rest upon common facts as well as raise common questions of law and as they were heard together, we propose to dispose of them by this common judgment.

3. The Chief Justice of High Court of Gujarat has framed rules called "High Court of Gujarat (Recruitment and Conditions of Service of Staff) Rules, 1992 ("Rules" for short) in exercise of powers conferred by Article 229 of the Constitution. The Rules came into force with effect from September 1, 1992 and apply to all the members of High Court staff. Rule-4 of the Rules categorises staff of the High Court in four classes.

Rule-47 of the Rules provides for promotion to the post of Section Officer and all higher posts. Promotion to the cadre of Section Officers can be effected from Assistants and Translators. Sub-rule (2)(a) of the said Rule stipulates that promotion to the post of Section Officer from Assistant will be effected strictly on consideration of efficiency and proved merits. As per the said sub-rule, merits should be determined on the basis of past performance and performance at the tests written and oral to be taken by the selection committee as may be appointed by the Chief Justice. As per the eligibility criteria laid down in sub-rule(4) and (5) of Rule-47, no person can be promoted from the lower post to higher post unless he has passed the departmental examination as prescribed and has experience of five years in the post from which he is to be promoted.

4. In the year 1997, 25 posts of Section Officers were vacant. Therefore, the then Registrar commenced process of promotion to the posts of Section Officers by preparing Office Submissions dated July 22, 1997. In the submissions it was stated that 113 Assistants were eligible for appearing in the written test, but 8 Assistants had not passed the requisite higher standard departmental examination and, therefore, were not eligible for being considered for selection or enlistment of their names in the select list. It was also pointed out that 5 Assistants were relieved so as to enable them to join as Civil Judge (J.D.) and Judicial Magistrate, First Class while one Assistant was working as a Private Secretary (English Stenographer Gr.I.) on the establishment of High Court and, therefore, remaining 91 Assistants who had completed 5 years of service and had also passed the requisite higher standard departmental examination, were eligible to appear in the written/oral tests. In the submissions prepared by the Registrar it was suggested that criteria adopted by the selection committee in past was that the Assistants who secured 40 marks in aggregate out of 80 marks of which 60 marks were assigned to written test and 20 marks to oral interview, were considered eligible for selection and as in view of Resolution No. SLT-1082-629-G-2, dated March 29, 1982 of the Government of Gujarat, General Administration Department, zone of consideration should be three times the number of vacancies, 75 senior most eligible Assistants only should be considered and called for written/oral test. By presenting the submissions, the Registrar sought directions; (A) as to whether only 75 senior most eligible Assistants excluding those against whom adverse remarks were passed and also those against whom departmental enquiry was pending, should be called

or (B) all the 91 eligible Assistants including those against whom adverse remarks were passed and also those against whom departmental enquiry was pending, should be called for written/oral test for the purpose of preparing select list of 25 candidates for their promotion to the posts of Section Officers, and (C) whether the Committee consisting of Registrar, Joint Registrar and Additional Registrar (Administration) should be constituted for conducting written test and oral test for preparing select list.

5. After discussing the matter, The Acting Chief Justice passed following order :-

'B' Yes : 91 includes 12 against whom adverse remarks are made and six against whom inquiries are pending. Therefore, restricting to 75, may mean restricting to 75 - 18 = 57. There is no reason to exclude 76 to 91 (16) eligible persons when 18 other persons also being considered.
Therefore, 'A' No.
'C' To be done later.
2.9.97"

Later on, The Chief Justice constituted selection committee of two learned senior sitting Judges of the High Court, one of whom had also experience in the past as Head of the Department. The Committee decided to adopt the same criteria for selection as was prevalent in the past. In view of direction given by Chief Justice, 91 Assistants were called for appearing at the written test (drafting) of 60 marks on September 27, 1997. Out of 91 candidates, 90 candidates appeared at the written test, while one remained absent. During the written test held on September 27, 1997, one Assistant was found to be copying in the test and, therefore, answer books submitted by 89 Assistants were examined. On office submissions being made, it was found by the selection committee that a candidate who had obtained less than 12 marks in written test, would not be eligible for selection even if he obtained full 20 marks at oral test and, therefore, there was no point in calling the candidates who had obtained less than 12 marks at the written test for oral test. Under the circumstances, 53 candidates who had obtained 12 and more marks at the written test, were called for the oral test on January 20, 1998. At the oral test, knowledge of rules and regulations, knowledge of practice and procedure as well as general impression and personality were adjudged by the selection committee. At the time of oral interview,

service records of the candidates were also with the selection committee pursuant to the direction given by it to the Office. Ultimately, by an order dated January 31, 1998 respondents No.30 to 43 in Letters Patent Appeal No. 1426/98 were promoted to the post of Section Officers. Thereupon Special Civil Application No. 351/98 was filed challenging the order dated January 31, 1998 granting promotions to respondents No. 30 to 43 in Letters Patent Appeal No.1426/98, by those Assistants who had passed written test, but were not called for oral interview; whereas Special Civil Application No. 1298/98 was filed challenging the said order of promotion by those Assistants who had appeared in the two tests, but were not selected for promotion to the post of Section Officer.

6. In the petitions, it was averred that in the written test, Assistants working on the judicial side were handicapped due to the very nature of work they had been doing for years together and, therefore, selection was bad. It was averred that Rule-47(2) of the Rules was ultra vires, as post of Section Officer could not have been treated as selection post. It was claimed that in view of the Government Resolution dated March 29, 1982, zone of consideration could not have been widened to 91 Assistants and, therefore, promotion order of respondents No.32 to 43 was bad in law. What was stressed was that those who had secured less than 12 marks at the written test, could not have been eliminated at the stage of oral interview and, therefore, promotion given to respondents no.30 to 43 in Letters Patent Appeal No. 1426/98 being contrary to Articles 14 & 16 of the Constitution should be set aside. It was pleaded that bunching of vancancies was illegal and, therefore, whole selection was arbitrary. By filing petition, the original petitioners had prayed to declare Rule-47(2) of the Rules to be ultra vires and to quash promotions granted to respondents no.32 to 43. On service of notice, affidavit-in-reply on behalf of respondent no.1 i.e. High Court of Gujarat was filed by Mr. B.S.Shankwar, working as Assistant Registrar. In the said reply, all the averments made in the petitions were controverted and it was pointed out that selection was not arbitrary at all. By filing the reply, the deponent had demanded dismissal of the petitions. We may state that it is not necessary to refer to the averments made in the reply in detail at this stage and, therefore, those averments are not referred to in detail. The original petitioners had also filed affidavit-in-rejoinder controverting the averments made in affidavit-in-reply filed on behalf of the High Court and reiterating what was stated in the petitions.

7. At the hearing of the petitions, as is evident from Para-4 of the judgment rendered by the learned Single Judge, promotion orders in question were mainly challenged on following grounds : (i) Junior Assistants to the original petitioners were considered and promoted by widening zone of consideration in breach of Government Resolution dated March 29, 1982 and, therefore, the entire selection process was illegal; (ii) Bunching of vacancies of different years made by the High Court had unnecessarily extended zone of consideration and, therefore, selection was vitiated; (iii) Before making selection of original respondents no.2 to 15 past performance was completely overlooked; whereas second component of Rule-47(2) of the Rules i.e. written test was applied out of proportion which resulted into selection of non-meritorious and junior persons and thus, selection was vitiated; (iv) Non-assigning of reasons by the selection committee for selection or non-selection of the candidates has vitiating effect on selection; (v) The petitioners in Special Civil Application No. 351/91 who had cleared written test could not have been excluded at the stage of oral test and as short-listing of candidates was illegal, promotion orders should be set aside; (vi) No syllabus was prescribed, nor guidelines were provided as to division of marks in written or viva voce and for considering service record, as a result of which selection was bad in law; (vii) Though the rules came into force in the year 1992, promotions were given to the posts of section officer in the year 1995 without holding written test and as Rule-47 is being followed discriminatorily, selection is bad; (viii) Rule-47(2) of the Rules is ultravires, as the said rule entirely negates the principle of seniority and as it does not provide any guidelines as to the nature of weightage to be given to the past performance, the written test as well as oral test.

Other subsidiary contentions were also urged besides the above referred to main grounds. After hearing the learned Counsel for the parties, the learned Single Judge held that widening of the zone of consideration by the learned Actg. Chief Justice was contrary to Government Resolution dated March 29, 1982 and, therefore, selection of those who were not within the zone of consideration was vitiated. The learned Single Judge further deduced that no marks were allotted for the past performance which amounted to non-consideration of the past performance of candidates and thus, promotion order was in utter disregard of Rule-47. Learned Single Judge held that selection of the Assistants for the promotional posts of Section Officer

was not on merits as contemplated by Rule-47(2) of the Rules and persons of average merit superseded large number of employees in the cadre of Assistants. In view of the judgment in MAJOR GENERAL IPS DEWAN v. UNION OF INDIA, JUDGMENT TODAY 1995(2) S.C. 654, the learned Judge concluded that promotion order was not bad because reasons were not recorded by the selection committee for selection or non-selection of the candidates. The learned Judge also negatived the contention that short-listing of candidates had vitiating effect on the promotion. So far as point regarding syllabus is concerned, it was held by the learned Judge that for written test, papers set for the written test taken in past were distributed well in advance free of costs to the candidates so that they could prepare for the forthcoming test and, therefore, the petitioners were not right in contending that the selection was bad as syllabus was not prescribed by the authorities. Necessary material was placed before the learned Single Judge which indicated that 25 vacancies had arisen in the years 1997 and, therefore, the learned Judge rejected the plea that bunching of vacancies for different years had unnecessarily extended the zone of consideration of candidates prejudicially affecting those who were not selected. In view of the conclusion that selection was bad for breach of G.R. dated March 29, 1982 prescribing zone of consideration as well as for breach of Rule-47(2) of the Rules, the learned Judge did not decide question whether Rule-47(2) of the Rules was ultravires or not. In view of the above referred to conclusions, the learned Judge set aside order dated January 31, 1998 promoting original respondents no.2 to 15 as Section Officer and directed the High Court to evolve fresh process of selection for the post of Section Officer in confirmity with Rule 47 of the Rules, 1992, giving due weightage to all the three components of determination of merit as mentioned in Rule-47(2) of the Rules by the impugned judgment, giving rise to present appeals.

8. Mr. S.N.Shelat,learned Additional Advocate General contended that G.R. dated March 29, 1982 does not apply to the post of Section Officer and,therefore, the learned Single Judge was not justified in quashing the promotion order on the ground that zone of consideration was widened by the learned Actg. Chief Justice in breach of said Government Resolution. It was pleaded that G.R. was applicable in case where promotion is to be effected on the basis of grading of past performance and not when promotion is to be given on the basis of past performance, written test as well as oral test and,therefore, promotions of the concerned

respondents should not have been set aside on the ground that there was breach of G.R. dated March 29, 1982. In the alternative,it was contended that learned Chief Justice has retained comprehensive powers under Rule 50(1) of the Rules for modification, variation and exception to be made in the Rules and/or orders of the Government and as learned Chief Justice in exercise of powers under Rule 50(1) of the Rules had widened zone of consideration, the selection should not have been set aside on the ground that zone of consideration prescribed in said Government Resolution was committed breach of. What was emphasised by the learned Counsel for the appellants was that the concept of zone of consideration would be applicable only at viva voce stage and not at the stage of written test and so, selection should not have been voided by the learned Single Judge. It was asserted that in any view of the matter, widening of zone of consideration has no invalidating effect on the selection madeand, therefore, promotion of the concerned respondents should not have been set aside by the learned Single Judge. In support of these submissions, the learned Additional Advocate General placed reliance on the decisions rendered in the cases of (1) ASHOK KUMAR YADAV & ORS. etc. etc. v. STATE OF HARYANA & ORS. A.I.R. 1987 S.C. 454, and (2) ALL INDIA STATE BANK OFFICERS FEDERATION AND OTHERS v. UNION OF INDIA AND ORS. JUDGMENT TODAY, 1996(8) S.C. 550.

9. On the other hand, Dr. Mukul Sinha,learned Counsel for the contesting respondents submitted that under Article 229(2) of the Constitution, Rules are framed by the learned Chief Justice in exercise of delegated rule making power; whereas appointment is made in exercise of administrative powers and,therefore, as administrative power was exercised contrary to Article 229(2) of the Constitution, learned Single Judge was justified in quashing the promotion order. It was claimed that changes can be made in the rules by the learned Chief Justice in exercise of his rule making power, but what was drawn on file is an administrative action, which should not be construed as modification, variation of and/or exception to the Government rule prescribed in G.R. dated March 29, 1982. According to Dr. Sinha, modification should be madein exercise of quasi legislative power for which a procedure is laid down and as no such procedure was followed, extension of zone of consideration was illegal. It was emphasised that learned Actg. Chief Justice had made a note which cannot be construed as modification of rules and the said variation was made not in exercise of powers under Rule

50(1) of the Rules, but on office note, which was made purely in administrative capacity and, therefore, the conclusion of the learned Single Judge that the Chief Justice cannot go beyond the Government Resolution by administrative action is perfectly correct. It was stressed that under Rule-91 of the Rules, when amendment etc. is made to the rules, it must be made known to all, but noting made on the office submissions was never made known to the employees and as power was not exercised by the learned Actg. Chief Justice as required by Rule-91 of the Rules, extension of zone of consideration was illegal. The learned Counsel for the contesting respondents submitted that concept of zone of consideration is applicable to candidates and not to stages of selection when promotion is on merits and this wholesome provision should have been adhered to while granting promotion to the post of Section Officer. It was submitted that by administrative orders, those who were ineligible were considered and as zone of consideration applies in the beginning when consideration starts,the learned Judge was justified in setting aside the selection to the post of Section Officer. The learned Counsel pleaded that rule of zone of consideration is sacrosanct and once zone of consideration is fixed, it cannot be breached by any one. What was stressed was that the effect of breach of zone of consideration is that the whole selection stands invalidated and selection cannot be sustained.

10. Mrs. K.T.Mehta, learned Counsel appearing for those candidates whose selection is set aside by the learned Single Judge adoptd the arguments advanced by the learned Additional Advocate General and strenuously urged that the learned Chief Justice has every power to extend the zone of consideration in exercise of powers conferred on him by Rule 50(1) of the Rules and as it had no invalidating effect at all, selection should not have been set aside.

11. In view of the rival submissions advanced at the bar,the question which arises for our consideration is whether any zone of consideration was prescribed by the Government Resolution dated March 29, 1982 for the post of Section Officer and if yes, whether zone of consideration was expanded by the learned Actg. Chief Justice in exercise of powers conferred by Rule 50(1) of the Rules ? In order to resolve this controversy it would be advantageous to reproduce the Government Resolution dated March 29, 1982 in extenso. It reads as under :-

" Zone of consideration for
promotion to posts filled
by Selection.

GOVERNMENT OF GUJARAT
General Administration Department,
Resolution No.SLT-1082-629-G.2,
Sachivalaya, Gandhinagar
Dated the 29th March, 1982.

Read :1. G.R. G.A.D. No.SLT-1177-G, dated 20.5.1978.
2. G.R. G.A.D.No.SLT-1177-G.2, dated 11.11.1980

RESOLUTION

In Government Resolution, General Administration Department No.SLT-1177-G, dated 20.5.1978 the principle of selectivity has been accepted for the purpose of appointment by promotion to the post of Heads of Departments. For this purpose, a Selection Committee is also set up under Government Resolution, General Administration Department No. SLT-1177-G.2, dated 11.11.1980 consisting of (1) The Chief Secretary (2) The senior most Secretary to Government next to the Chief Secretary (3) The Secretary of the Administrative Department concerned.

2. This Selection Committee will classify officers within the zone of consideration as outstandindg, very good, good and unfit for promotion. The Select List will then be prepared in the size equal to number of vacancies in the same order, subject to maintenance of seniority inter-se of persons in the same category for the purpose of classification also, Government is pleased to direct in consultation of Gujarat Public Service Commission that the zone of consideration shall be as under :-

No. of vacancies	No.of officers to be considered
1.	5
2	8
3	10
4 or more	three times the number of vacancies.

3. All Secretariat Department should strictly ensure that these instructions are invariably followed while considering promotion to the post filled by promotion on selection basis.

By order and in the name of the Governor of Gujarat.

H.B.Pandhit
Joint Secretary to the Govt.of Gujarat,

General Administration Department"

12. A bare reading of the above quoted Government Resolution makes it evident that it is applicable when appointment by promotion to the post of Head of Department is to be made. The Government of Gujarat, Legal Department by a resolution dated June 9, 1971 has declared the Registrar,High Court to be Head of the Department.It is an admitted position that Section Officer cannot be termed or treated as Head of the Department. Therefore, in our view, zone of consideration stipulated in G.R. dated March 29, 1982 would not be applicable when promotion is to be effected from the post of Assistant to the post of Section Officer. The Government Resolution in question further makes it clear that for the purpose of appointment by promotion to the post of Head of the Department,a selection committee of high officials is set-up and selection committee has to classify officers within the zone of consideration as outstanding, very good, good and unfit for promotion. The criteria for promotion as laid down in G.R. dated March 29, 1982 is the same as to be found in the case of promotion to members of the State Civil Services to Indian Administrative Services. In exercise of its powers under Rule 8(1) of the Indian Administrative Service (Recruitment) Rules, 1954, the Central Government has framed The Indian Administrative Service (Appointment by promotion) Regulations, 1955 and Regulation 5(4) reads as under :-

"5(4): Selection Committee shall classify eligible officers as outstanding, very good, good or unfit as the case may be on an overall relative assessment of their service record".

If the Government circular is scrutinised carefully, it becomes evident that promotion to the post of heads of departments has to be granted on the basis of service record only and, therefore, said Government resolution cannot be held to be applicable to a case where promotion to the higher post is to be given on the basis of past performance and performance at the tests

written as well as oral. Therefore, zone of consideration as prescribed in Government resolution dated March 29, 1982 will not be applicable to the facts of the present case. We may state that under Rule 91(2) of the Rules, the Chief Justice has powers from time to time to pass such orders as he may deem fit in regard to matters which have not been provided or sufficiently provided for in the rules. As we have come to the conclusion that zone of consideration prescribed in G.R. dated March 29, 1982 is not applicable to a case of promotion to the post of Section Officer, the learned Chief Justice had every power to pass orders regarding zone of consideration which is not provided in the Rules. Under the circumstances, the selection of those who were not within the zone of consideration is not liable to be set aside on the ground that there is breach of zone of consideration as prescribed by G.R. dated March 29, 1982.

13. Even if it is assumed for the sake or agrument that zone of consideration as stipulated in G.R. dated March 29, 1982 is applicable to a promotion to the post of Section Officer, as the promotional post is to be filled by selection, the next question which falls for our consideration is whether the said Government Resolution was modified or varied in any manner by the learned Chief Justice in exercise of his powers under Rule 50(1) of the Rules ? Rule 50(1) of the Rules, which is relevant for our purpose reads as under :-

"50(1) In respect of all such matters regarding the conditions of service of Court servants for which no provision or insufficient provision has been made in these Rules, the rules and orders for the time being in force and applicable to servants holding corresponding posts in the Government of Gujarat, which are not inconsistent with these Rules, shall regulate the conditions of service of Court servants subject to such modifications, variations, and exceptions, if any, in the said rules and orders, as the Chief Justice may, from time to time specify;

Provided that no order containing modifications, variations or exceptions in Rules relating to salaries, allowances, leave or pensions shall be made by the Chief Justice except with the approval of the Governor.

Provided further that the powers excercisable under the rules and orders of the

Government by the Governor or by any authority subordinate to the Governor shall be exercisable by the Chief Justice or by such person as he may, by general or special order, direct.

A bare reading of the above quoted rule makes it clear that where no provision or insufficient provision is made in the Rules, in respect of matters regarding the conditions of service of Court servants, the rules and orders for the time being in force and applicable to servants holding corresponding posts in the Government of Gujarat shall regulate the conditions of service of Court servants. However, rules or orders of Government shall regulate condition of service subject to modifications, variations or exceptions made therein by the Chief Justice. Comprehensive powers have been retained by the Chief Justice under Rule-50 for modifications, variations and exceptions in the Rules and orders for the time being in force and applicable to servants holding corresponding posts in the Government of Gujarat. It is relevant to note that promotion to the post of Section Officer is purely on merits and merit has to be adjudged on the basis of past performance as well as performance at the tests- written and oral. When selection is made on merits, normally all eligible candidates should be given equal opportunity to compete amongst themselves so that services of best meritorious candidates are available to the institution. When the merit is required to be determined on the basis of past performance, prescription of zone of consideration may become relevant, but when merit is required to be determined at the written test as well as oral test and on the basis of perusal of past performance, it is always better to consider all eligible candidates. So far as facts of the present case are concerned, office had suggested to the learned Actg. Chief Justice to call only 75 candidates for written test in view of zone of consideration prescribed in G.R. dated March 29, 1982, but after having considered the matter, the learned Actg. Chief Justice was of the view that as the merit was the sole criteria for promotion, all eligible candidates should be considered and, therefore, by passing a reasoned order which is quoted in earlier part of this judgment, the learned Actg. Chief Justice had directed the Office to consider cases of all 91 eligible candidates. In view of provisions of Rule 50(1) of the Rules, in respect of all matters regarding conditions of service of Court servants for which no promotion or insufficient provision has been made, rules and orders for the time being in force and applicable to servants holding corresponding posts in the Government of Gujarat, regulate the conditions of service of Court

servants. However, this regulation of the Conditions of service of Court servants is subject to modifications, variations and exceptions, if any, in the said rules and/or orders as the Chief Justice may, from time to time specify. Therefore, there is no manner of doubt that the Chief Justice has all powers to modify or vary any rule or order for the time being in force and applicable to servants holding corresponding posts in the Government of Gujarat which is applicable to Court servants pursuant to the provisions made in Rule-50(1) of the Rules. In our view, there is no manner of doubt that when the learned Actg. Chief Justice directed the office to consider the cases of all 91 eligible candidates for the promotion to the posts of Section Officer, he modified or varied the Government Resolution dated March 29, 1982 by which it was prescribed that number of candidates should not exceed three times the number of vacancies. Under the circumstances, it is difficult to agree with the conclusion of the learned Single Judge that zone of consideration was not expanded or enlarged by the learned Actg. Chief Justice in exercise of powers under Rule 50(1) of the Rules. Expansion/extension of zone of consideration by the learned Chief Justice is in consonance with the scheme envisaged by Rule 50(1) of the Rules and no exception can be taken to same by any one. Discretionary power is vested in the Chief Justice as to which part of the rule or order of the government should be modified. The words "from time to time specify" appearing in Rule 50(1), do contemplate a situation where the Chief Justice is required to deal with a particular matter as the occasion may arise. The learned Actg. Chief Justice conscienciously exercising powers under Rule 50(1) extended zone of consideration. Before passing order under Rule 50(1) for modifying or varying government order, the Chief Justice is not supposed to resort to a particular procedure and can amend or vary order of the Government by passing order on the office submissions. In view of this, the order drawn by the learned Actg. Chief Justice on the office submissions will have to be treated as an order made under Rule 50(1) of the Rules modifying or varying the Government Resolution dated March 29, 1982. Therefore, the conclusion drawn by the learned Single Judge that selection of those who were not within the zone of consideration, is liable to be set aside because the learned Actg. Chief Justice committed breach of Government Resolution dated March 29, 1982 cannot be sustained and is liable to be set aside.

14. At this stage, it would be relevant to notice comprehensive powers which have been retained by the

Chief Justice under Rule 91(2) of the Rules, which reads as under :-

"91(2): The Chief Justice may from time to time alter, amend or repeal any of these Rules and make such further Rules or pass such orders as may deem fit in regard to all matters herein provided or matters incidental or ancillary to these Rules or in regard to matters which have not been provided or sufficiently provided for in these Rules;

Provided that if such orders relate to pay, salaries, allowances, leave or pension of the servants of the High Court, such orders shall be made with the approval of the Governor."

15. Though we have held that by directing the Office to consider the cases of all 91 eligible candidates, learned Actg. Chief Justice expanded/extended zone of consideration stipulated in G.R. dated March 29, 1982 in exercise of powers under Rule 50(1) of the Rules, expansion/extension of zone of consideration is also saved in view of the provisions of Rule 91(2) of the Rules quoted above. The submission that the impugned decision is not a rule because it was not taken after conforming to all norms of legislation, nor it is an administrative decision taken in conformity with any existing rules, has no substance. The Chief Justice is competent to give direction to the office to consider all 91 eligible candidates for promotion to the post of Section Officer. It was not necessary for the Chief Justice to mention source of power which was exercised. Moreover Article 229(2) of the Constitution nowhere prescribes or indicates any particular form in which rules should be framed, nor does it prescribe any formality required to be gone into. The decision to extend zone of consideration was not only in larger interest of the institution, but was also in the interest of all eligible candidates. The said decision was made known to the concerned employees when it was informed on notice board that all eligible candidates would be considered. Hence, even though the decision is not expressed in the form or in the words in which the rule is framed or an order is issued,it would amount to rule framed in exercise of powers conferred by Article 229(2) of the Constitution. In MADHAV RAMCHANDRA GANDOLE v. REGISTRAR, HIGH COURT OF JUDICATURE AT BOMBAY AND OTHERS, INDIAN LAW REPORT, 1983 page 1627, question was regarding promotions to the posts of Assistant Registrars from the post of Superintendents. There were Superintendents at Bombay and Nagpur, but not at Rajkot. It was proposed to

the Chief Justice that common seniority list of Superintendents should be prepared and for promotion to the post of Superintendents, the Assistant Superintendents be considered from out of the three offices. On office submissions, the learned Chief Justice agreed with proposal of Registrar. The said decision was subject matter of challenge in a petition which was filed under Article 226 of the Constitution. It was argued that the decision taken by the Chief Justice was not referable to Article 229(2) which confers legislative powers of framing rules. Negativating the said contention, the learned Single Judge of the Bombay High Court has held as under :-

"Lastly, it was urged that the impugned decision is not referable to art. 229(2) which confers a legislative power of framing rules. It was further contended on behalf of the petitioner that the impugned decision is not a rule because it was not taken after conforming to all norms of legislation nor it is an administrative decision taken in conformity with any existing rule. There is no substance in these contentions. As mentioned above, the Chief Justice was competent in exercise of the powers conferred by art. 229(2) to prepare separate seniority lists of clerk working on the establishment of three benches of the High Courst. It was not therefore, ncessary to mention the source of the power which was exercised. Moreover, art. 229(2) of the Constitution nowhere prescribes or indicates any particular form in which rule should be framed, nor does it prescribe any formality required to be gone through. The decision laid down principles of general application in the matter of fixation of seniority of the clerks working at three different places. This decision was made known to the concerned employees at least in the replies given to their representations. It was immediately implemented. Hence even though the decision is not expressed in the form or in the words in which a rule is framed or an order is issued, it would amount to a rule framed in exercise of the powers conferred by art. 229(2) of the Constitution.

The above view is supported by the Full Bench decision of this Courst in Chandrakant Sakharam Karkhanis and others v. State of Maharashtra and others-(27). In that case, the

following three questions were referred to the Full Bench :

(1) Whether the Circulars, Orders or Resolutions or parts thereof laying down rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement. By order and in the name of the Governor of Maharashtra and intended to be applicable straightway are or amount to the rules framed in exercise of the powers conferred under the proviso to art. 309 of the Constitution of India although the said Circulars, orders or resolutions do not expressly state that the same are made or issued in exercise of the powers conferred under the proviso to art. 309 of the Constitution of India and are not published in the Government Gazette.

(2) Whether the said Circulars, Orders or Resolution or parts of them as set out in Question NO.1 above must be deemed to be rules made in exercise of the powers conferred under the proviso to art. 309 of the Constitution of India.

(3) Whether the said Circulars, orders or resolutions or parts thereof as set out in question No.1 above have the same force or effect in law as a rule of rules made in exercise of the powers conferred under the proviso to art. 309 of the Constitution of India.

Answering the first question in the affirmative, the learned Judges observed thta it is not necessary that publication should be in a particular manner. They also observed that the proviso to art. 309 of the Constitution of India nowhere prescribes nor indicates any particular form in which a rule should be framed nor does it prescribe any formality which is required to be gone through and hence the rules governing recruitment and service conditions framed under the proviso to art. 309 can take any form of either letter or memorandum of circular, order of Resolution and it is not necessary that they should be styled as rules framed under the proviso to art. 309 of the Constitution of

> India. These principles which were laid down in the context of art. 309 of the Constitution of India are applicable with equal force to an action taken by the Chief Justice under art. 229(2) of the Constitution of India."

16. We are in respectful agreement with the view expressed by the learned Single Judge of the Bombay High Court and we hold that the extension/expansion of the zone of consideration by the learned Actg. Chief Justice is also referable to exercise of powers under Rule 91(2) of the Rules and is saved by those powers.

17. There is yet another aspect of the matter which deserves special mention. Even if one were to conclude that the Chief Justice had not modified zone of consideration stipulated in G.R. dated March 29, 1982, we do not find breach of the said requirement. Since this was the selection post, the candidates facing departmental inquiry and having shocking adverse remarks in the Annual Confidential Reports which were 18 in number would have had a very dim chance of being selected even if they would have secured high merits on the basis of written and oral test. Thus, in substance more than 75 candidates were not considered at all. In fact, the real competition was amongst 75 candidates. If the office submission had been accepted, the choice would have been narrowed to the Administration to select 25 candidates from amongst 57 candidates instead of 75 candidates. Under the circumstances, it is difficult to hold that any breach was committed by the learned Actg. Chief Justice of G.R. dated 29.3.1982.

18. While coming to the conclusion that the selection is bad, as zone of consideration was widened in breach of G.R. dated March 29, 1982, the learned Single Judge has placed reliance on the decision rendered in the case of VINODKUMAR SANGAL v. UNION OF INIDA AND OTHERS, (1995) 4 S.C.C. 296. As observed by the learned Single Judge himself it is essentially a case of bunching of vacancies. The petitioner in that case was promoted in the year 1978 on the recommendation of departmental promotion committee, but the same was not accepted by him for personal reasons. No departmental promotion committee could be convened during the period from 1979 to 1984. Though the petitioner was given promotion on adhoc basis, the departmental promotion committee which met in 1985 did not recommend the petitioner for promotion. That decision was challenged before the Court. In support of the challenge, a memorandum

requiring the departmental promotion committee to meet annually was produced. The memorandum, inter-alia, also pointed out that large field of choice might result in excessive supersession. The Supreme Court found that no separate selection was made for the vacancies which had occurred in the years 1980, 1982 and 1983, as a result, field of choice had been widened much more prejudicially affecting choice of the petitioner for being selected to promotional post. The Court accordingly directed the D.P.C. to consider the petitioner's case for promotion on the higher post for each of the year separately i.e. against the vacancies which had occurred in 1980, 1982 and 1983 and to give him promotion from the date and year he was selected. Here, the selection committee was constituted for considering cases of deserving candidates for promotion to the posts of Section Officer for the vacancies which had taken place in the year 1997. The case on hand is not a case of bunching of vacancies and, therefore, in our opinion the ratio laid down in the above-referred to decision would not be applicable to the facts of the present case for voiding selection on the ground that zone of consideration prescribed in Government Resolution is breached.

19. Another judgment relied on by the learned Single Judge for annulling the decision of the learned Chief Justice to extend zone of consideration is in ASHOKKUMAR SHARMA AND OTHERS vs. CHANDER SHEKHAR AND OTHER, JUDGMENT TODAY 1997(4) S.C. 99. The facts of the said case indicate that a competitive examination was held for recruitment to the post of Junior Engineer. It was found that 33 candidates who had appeared with others, were not eligible on the relevant date, but those 33 candidates were selected. Their appointments were challenged before High Court. The High Court directed that those 33 candidates should be placed in seniority below qualified selected candidates. The 33 candidates approached the Supreme Court. The Supreme Court held that allowing 33 candidates to appear in the competitive examination was not permissible. In our view, this judgment can hardly be pressed into service for the purpose of canvassing the point that learned Actg. Chief Justice had no power to extend/widen the zone of consideration stipulated in G.R. dated March 29, 1982. What is directed by the learned Actg. Chief Justice in the present case is to consider all 91 eligible candidates. As no direction was given by the learned Actg. Chief Justice to consider ineligible candidatess, we are of the opinion that the principles laid down in the case of ASHOKKUMAR SHARMA & OTHERS (Supra) will not be applicable to the facts of the present case and the decision of the learned Actg. Chief

Justice to extend zone of consideration prescribed in G.R. dated March 29, 1982 cannot be voided on the principle laid down in the said decision. Therefore, the selection made to the posts of Section Officers is not liable to be quashed on the ground that the learned Actg. Chief Justice had illegally extended/expanded zone of consideration in breach of G.R. dated March 29, 1982. The said finding recorded by the learned Single Judge being erroneous and contrary to the provisions of Rule 50(1) and Rule 91(2) of the Rules is hereby set aside.

20. Now, we proceed to consider two alternative submissions advanced by the learned Additional Advocate General viz. (i) that the zone of consideration would be applicable only at viva voce test and as zone of consideration prescribed by G.R. dated March 29, 1982 was not breached at the stage of viva voce test, selection should not have been set aside; and (ii) even if zone of consideration is extended contrary to G.R. dated March 29, 1982, it would not invalidate the whole selection. In reply to these alternative submissions, Dr. Mukul Sinha, learned Counsel for the contesting respondents pleaded that zone of consideration is applicable at all stages of selection and applies in the beginning when consideration for selection starts. The learned Counsel emphasised that if the selection is in breach of zone of consideration prescribed by rules or orders, the whole selection would be not only illegal, but would stand invalidated. We have considered the alternative submissions advanced on behalf of the appellant. In ASHOK KUMAR YADAV AND OTHERS etc. etc. v. STATE OF HARYANA AND OTHERS etc. etc. AIR 1987 S.C. 454, the Court was concerned with recruitment made by Haryana Public Service Commission to 61 posts in Haryana Civil Service (Executive) and other allied Services. The relevant rules provided that a competitive examination was to be held consisting of written examination in different papers having an aggregate of 700 marks and viva voce examination carrying 200 marks. The rules, inter-alia, further provided that no candidate was eligible to appear in viva voce test unless he obtained 45 marks in the aggregate of all subjects. In response to the said advertisement, 6000 candidates applied and appeared for written examination and out of those candidates, over 1300 secured more than 45% marks and thus qualified for being called for interview for the viva voce examination. Though originally the recruitment was only for 61 posts, during the time when the selection process was on the way, total number of 119 posts became available. Haryana Public Service Commission invited all the 1300 and odd candidates who had qualified for the

viva voce test and the interview lasted for almost half a year. On the basis of total marks obtained in the written examination as well as viva voce test, 119 candidates were selected and recommended by the Commission to the State Government. Some of the candidates who had not been selected, filed writ petition in the Punjab and Haryana High Court challenging the said selection. On an application being made for being joined as respondents by 5 out of the 119 selected candidates, they were impleaded as respondents. The Division Bench of the High Court allowed the writ petition and held that Haryana Public Service Commission should not have called for interview all the candidates who had obtained more than 45% marks in the written examination and the number of candidates to be called for interview should not have exceeded twice or thrice the number of vacancies required to be filled in. This was one of the grounds on which selection of Ashok Kumar Yadav was quashed. Thereupon appeal was filed by Ashok Kumar Yadav and State of Haryana. Their appeal was allowed by the Supreme Court and the selection made by Haryana Public Service Commission was upheld. While dealing with the submissions relating to the Haryana Public Service Commission calling of 1300 and odd candidates for viva vice test, who had secured 45% marks or more marks in the written examination for only 61 vacancies, it was observed by the Supreme Court that merely because the minimum qualification for eligibility to appear in the viva voce test for a candidate was to obtain at least 45% marks in aggregate in the written examination, Haryana Public Service Commission was under no obligation to call for viva voce test all the candidates who satisfied all the minimum eligiblity requirement. According to the Supreme Court, it was open to the Commission to call for viva voce test limited candidates who figured at the top of the list. After referring to Kothari Commission's Report on the recruitment policy and selection methods for the Civil Services Examination, the Supreme Court observed at page 471 as under :-

> "We are, therefore, of the view that where there is a composite test consisting of a written examination followed by a viva voce test, the number of candidates to be called for interview in order of the marks obtained in the written examination should not exceed twice or at the highest thrice the number of vacancies to be filled. The Haryana Public Service Commission in the present case called for interview all candidates numbering over 1300 who satisfied the

minimum eligibility requirement by securing a minimum of 45% marks in the written examination and this was certainly not right, but we may point out that in doing so, the Haryana Public Service Commission could not be said to be actuated by any mala fide or oblique motive, because it was common ground between the parties that this was the practice which was being consistently followed by the Haryana Public Service Commission over the years and what was done in this case was nothing exceptional."

From what has been held by the Supreme Court in the above-referred to case, it becomes evident that the concept of zone of consideration would apply at the stage of oral test and not at the stage of written test. Here in the facts of the present case, candidates more than three times the number of vacancies were not called for oral interview and, therefore, in our view, selection does not stand vitiated. Even if it is assumed for the sake of argument that the concept of zone of consideration is applicable at all the stages of selection and applies in the beginning when consideration for selection starts, the question still requires to be considered is whether breach of requirement relating to zone of consideration would invalidate the selection. On this point several judgments have been cited on both sides and, therefore, we will make brief mention of the same. In Ashok Kumar Yadav's case (supra), the Supreme Court did observe that the number of candidates to be called for interview should not exceed twice or thrice the number of vacancies to be filled. Nevertheless, after making such observation the Court posed a question as to whether this has any invalidating effect on the selection made by the Haryana Public Service Commission ? The answer to this is provided in the subsequent paragraph in the following words.

"We do not think that the selections made by the Haryana Public Service Commission could be said to be vitiated merely on the ground that as may as 1300 and more candidates representing more than 20 times the number of available vacancies were called for interview, though on the view taken by us that was not the right course of follow and not more than twice or at the highest thrice the number of candidates should have been called for interview. Something more than merely calling an unduly large number of candidates for interview must be shown in order to invalidate

the selections made".

In All INdia State Bank Officers Federation and others v. Union of India and ors., Judgment Today, 1996(8) SC 550, zone of consideration prescribed earlier was done away with. It was argued before the Supreme Court that it was unreasonable not to limit zone of consideration to 3 to 4 times the number of vacancies and the selection was, therefore, invalidated. After referring to the decisions of the Supreme Court in Ashok Kumar Yadav's case and other cases, the Supreme Court has held as under in Paras 14 & 17 :-

"14. It is clear from the aforesaid that this Court was of the opinion that while it was desirable that the number of candidates who were called for viva voce examination should not be unduly large but it did not agree with the conclusion of the High Court that calling large number of candidates invalidated the selection. In other words, not having a restricted zone of consideration was not regarded as illegal or bad in law. An unduly large number of candidates to be interviewed may make it impossible to carry out a satisfactory viva voce test and the interview may tend to be casual, superficial or sloppy. The above quoted observations are only words of caution lest the viva voce test be reduced to farce. Notwithstanding the fact that the Court did not approve of a large number of candidates being called for interview, nevertheless the selections so made by the Haryana Public Service Commission were not invalidated by this Court and the judgment of the High Court was set aside and the selection made was upheld.

17. Our attention has not been drawn to any decision or observation of this Court which has taken a contrary view. Having a reasonable eligibility condition, as four years in the present case, may become meaningless if all the eligible officers are not considered for promotion. By increasing the number of years from two to four,the field has been somewhat restricted and considering that selection has to be made only on the basis of merit, it is not unreasonable to give an opportunity to all the eligible officers to compete with each other and

for the best persons to be selected. Moreover, this case relates to in- service promotion while Ashok Kumar Yadav was a case of direct recruitment. We are, therefore, unable to agree with the petitioners that the change of the policy brought by the Board in its meeting on 7th March, 1989 in this regard is in any way bad in law."

In view of the above-referred to princiles enunciated by the Supreme Court, we do not think that the selection made by the selection committee could be said to be vitiated merely on the ground that as many as 91 Assistants were considered for selection. As observed by the Supreme Court something more than merely calling an unduly large number of candidates for interview must be shown in order to invalidate the selections made and the petitioners have failed to point out any relevant factors such as arbitrariness, unreasonableness, favourism, mala fides etc. so far as selections in question are concerned. Therefore, merely calling unduly large number of candidates for interview cannot be treated as invalidating the whole selection. The learned Counsel for the respondents placed reliance on the decision rendered in the case of U.P.JAL NIGAM AND OTHERS v. NARINDER KUMAR AGARWAL, (1996) 8 S.C.C. 43. In that case, an employee was not considered, as he was not falling within the zone of consideration. This is quite evident from the observations made by the Supreme Court in Para-11 of the reported judgment. In the said case,it is not propounded by the Supreme Court that selection would stand vitiated if candidates representing more than twice or at the highest thrice the number of vacancies are considered for selection.

In STATE OF HYMACHAL PRADESH AND OTHERS v. SURINDER KUMAR MOHINDRA AND OTHERS, 1997 SCC (L & S) 495, the concerned employee did not come within zone of consideration on the first occasion; whereas on the 2nd occasion he was not selected. In that case also, it is not laid down by the Supreme Court that consideration of more candidates than prescribed by zone of consideration would vitiate the selection. On the facts of the said case, the Supreme Court held that non-promotion of the respondent to the post of Joint Director did not infringe Art. 14 of the Constitution.

In R.S.AJARA AND OTHERS v. STATE OF GUJARAT AND OTHERS, (1997) 3 SCC 641, the issue involved was invalidity of Resolution dated January 31, 1982 passed by the State of Gujarat which related to determination of

seniority of directly recruited Assistant Conservators of Forest in Gujarat State Forest Service Class-II by taking into account the period of training. The appellants who were directly recruited were selected by G.P.S.C. in 1979 and were sent for two years training in January, 1980. After completing the course in forestry, they were appointed as Assistant Conservators of Forest in February, 1982. The respondents were appointed as Assistant Conservators of Forest prior to direct recruits. Provisional seniority list was published by the Government and thereafter final seniority list was published, but these lists did not contain names of the direct recruits. The State Government prepared a select list for promotion as Deputy Conservator of Forest in which none of the direct recruits was included. The promotee officers challenged the select list prepared on the ground that there were 15 posts of Deputy Conservator of Forest for which according to Hand-Book for personnel officers, 45 candidates should have been considered, but only 23 candidates were considered and, therefore, the select list was invalid. As is evident, in this case, less number of candidates were called; whereas others were ignored. Therefore, the Supreme Court has rightly held selection to be invalid. Here, in our case, all eligible candidates are considered. Therefore, in our view, the principle laid down in the above quoted decision would not apply to the facts of the present case.

In NATIONAL FEDERATION OF S.B.I. AND OTHERS v. UNION OF INDIA AND OTHERS, AIR 1995 S.C. 1457 the Supreme Court has considered the meaning of the phrase "Zone of consideration" in para-12 of the reported judgment. Therein, selection was based solely on the oral test and not on merits to be ascertained on the basis of past performance and performance at the tests written as well as oral. After laying down as to what is zone of consideration, the judgment does not proceed further to hold that consideration of more candidates than prescribed by zone of consideration would invalidate the selection. The net result of the above discussion is that if more candidates than twice or thrice the vacancies are considered, it would not automatically invalidate the selection. The learned Counsel for the contesting respondents has not drawn our attention to any decision or observation of the Supreme Court which has taken a contrary view. For all these reasons, we hold that the selection to the post of Section Officers was not vitiated on the ground that zone of consideration as prescribed in Government Resolution dated March 29, 1982 was contravened by the learned Acting Chief Justice. The

finding recorded by the learned Single Judge to the effect that selection was vitiated, as there was breach of prescription of zone of consideration made in Government Resolution dated March 29, 1982 is erroneous as well as contrary to law and, therefore, the same is hereby set aside.

21. This takes us to the next ground which has weighed with the learned Single Judge in invalidating the selection. While quashing the selection in question, the learned Single Judge has, inter-alia, held that, (i) how odd magic number of 80 is evolved and what is its rationale is not known, (ii) no marks are allotted for the past performance by the committee, (iii) the High Court could not have continued with the old procedure of selection even after coming into force of Rules 1992, (iv) continuance of the old procedure is in utter disregard of Rule-47 and (v) the selection for the post of Section Officers is not on the basis of proven merits. Mr. S.N.Shelat, learned Counsel for the appellant submitted that those who had appeared at the examination and failed, cannot challenge the selection subsequently. It was submitted that in the petition the original petitioners had not averred that service records of the officers were not taken into consideration by the selection committee, but since that point was argued and has been dealt with by the learned Single Judge, the same will have to be dealt with by this Court. It was claimed that the service records of all the officers were placed before the selection committee and, therefore, the presumption would be that the records were considered by the committee. What was asserted was that what weightage should be given to the records is for the selection committee which is supposed to evaluate merits of the officers and it is not for the Court hearing a petition under Article 226 of the Constitution to assess relative merits of the officers and come to the conclusion that the selection was not on merits. The learned Counsel further pleaded that scope of judicial review in respect of assessment of merits of the officers made by the selection committee on the basis of past performance as well as on the basis of written and oral tests is very limited and merely because no marks are assigned to past records, selection would not stand vitiated. It was also contended that how the assessment of the merits of the officers should be made cannot be a subject matter of judicial review in a petition under Article 226 of the Constitution and what is the merit should have been left to the decision of the expert body and should not have been made a subject matter of decision by the learned Single Judge while disposing of a petition under Article

226 of the Constitution. It was further stressed that all the candidates were given equal opportunity of competing with each other and as the process adopted by the selection committee for assessing merits while considering three criterions is not arbitrary, the selection could not have been set aside by the learned Single Judge. In support of his submissions, learned Counsel placed reliance on; (1) MANGEL SINGH AND OTHERS v. UNION OF INDIA AND OTHERS, JUDGMENT TODAY, 1998(8) S.C. 176, (2) MADHYA PRADESH PUBLIC SERVICE COMMISSION v. NAVNIT KUMAR POTDAR AND ANOTHER, A.I.R. 1995 S.C. 77, (3) DALPAT ABASAHEB SOLUNKE etc. etc. v. DR. B.S. MAHAJAN etc. etc. A.I.R.1990 S.C. 434, (4) DURGA DEVI AND ANOTHER v. STATE OF H.P. AND OTHERS, A.I.R. 1997 S.C. 2618, (5) MEHMOOD ALAM TARIQ AND OTHRS v. STATE OF RAJASTHAN A.I.R. 1988 S.C. 1451, (6) Special Civil Application No.1272/80 decided on September 1, 1980 by P.D.Desai, J.(as he then was), (7) OM PRAKASH SHUKLA v. KUMAR SHUKLA & ORS. A.I.R. 1986 S.C. 1043, and (8) MADAN LAL AND OTHERS v. STATE OF JAMMU AND KASHMIR AND OTHERS, A.I.R. 1995 S.C. 1088.

As against this, Dr. Mukul Sinha, learned Counsel for the respondents pleaded that past performance is an independent and separate factor which is totally ignored by the selection committee while effecting the selection and, therefore, the learned Single Judge was justified in setting aside the selection. It was claimed that the question whether policy of promotion as reflected in Rule 47(2) of the Rules was adhered to or not by the selection committee can always be gone into by the Court in a petition under Article 226 of the Constitution and, therefore, the learned Single Judge did not exceed jurisdiction while deciding the petition filed by those who were aggrieved by the selection. What was stressed was that past performance plays an important role in adjudging the merits of the officers and as consideration of the same is not reflected on the files, the selection should be treated as arbitrary. The learned Counsel emphasised that when marks were allotted for written test and oral test, it was incumbent upon the selection committee to allot marks for past performance in order to eliminate arbitrariness while making selection and therefore, the learned Single Judge was perfectly right in holding that the selection was contrary to Rule-47(2) of the Rules. The learned Counsel for the contesting respondents brought to the notice of the Court the marks secured by the selected candidates and pleaded that officers whose performance was average have been selected by the selection committee for the post of section officers and, therefore, no exception can

be taken to the finding recorded by the learned Single Judge that the selection was not on merits. It was also highlighted that in view of the changes in guidelines laid down in the Rules of 1992, a better procedure for selection ought to have been evolved by the High Court and as past performance was ignored while adjudging merits of the officers, appeals should be dismissed. In support of his submissions, learned Counsel placed reliance on the decisions rendered in the cases of (i) B.V. SIVAIAH ORS. v. K. ADDANKI BABU & ORS.,(1998) 6 SCC 720, (ii) C.P.KALRA v. AIR INDIA THROUGH ITS MANAGING DIRECTOR, BOMBAY AND OTHERS, 1993(7) SLR page 1, (iii) UNION OF INDIA v. M.L.CAPOOR & ORS., AIR 1974 S.C. 87, (iv) A.P. STATE FINANCIAL CORPORATION v. C.M.ASHOK RAJU & ORS. ,(1994) 5 SCC 359, and (v) JAGATHIGOWADA C.N. & ORS. v. CHAIRMAN, CAUVERY GRAMINA BANK & ORS.(1996) SCC (L & S) 1310.

21. Rule 47 regulates the promotions. As per Rule 47(1) of the Rules, posts of Section Officer are selection posts and selection has to be made strictly on merits and on record of performance. It further stipulates that no Court servant has claim to this post merely on the strength of seniority. According to Rule 47(2)(a) of the Rules, promotion to the post of Section Officer from Assistant has to be effected strictly on consideration of efficiency and proved merits. The merits has to be determined on the basis of past performance as well as performance at the tests written and oral. Determination of merits has to be done by the selection committee to be appointed by the Chief Justice. According to sub-rule (4) of Rule-47, Court servant cannot be promoted to the post of section officer, unless he has passed departmental examination as prescribed; whereas sub-rule (5) of Rule-47 stipulates that no Court employee can be promoted from the lower post to higher post unless he has experience of five years in the post from which he is to be promoted. The reasonable reading of the above-referred to rules makes it more than clear that efficiency and proved merits are criterions for the purpose of effecting promotion to the post of Section Officer. As observed earlier, the learned Chief Justice had constituted selection committee of two senior learned Sitting Judges of this Court, one of whom had vast experience of administration of the High Court. It may be mentioned that prior to the Rules of 1992, Rules called "High Court of Gujarat (Recruitment and Conditions of Service of Staff) Rules, 1964 were in force. Rule-38 sub-rule (2) of 1964 Rules provided that posts of Superintendent and any higher posts were selection posts and no Court servant had a claim to them solely by way of

seniority. Thus, even earlier also, promotion to the post of Section Officer was required to be made only on merits and as far as possible seniority in the cadre was ordinarily required to be taken into account. It is relevant to note that the case on hand was the first occasion for effecting promotions to the posts of Section Officer in accordance with Rules of 1992. Therefore, Office while making submissions had also sought direction as to whether past criteria which was adopted for the selection on the earlier occasion viz. that the Assistants who secured 40 marks in aggregate out of 80 marks of which 60 marks are assigned to written test and 20 marks to oral interview should be considered eligible for selection, should be followed or not. The record indicates that it was decided to adopt criteria for selection as was in vogue on the earlier occasions.Though the learned Single Judge has held that how odd magic number of 80 is evolved and what is its rationale, the learned Single Judge has not indicated that number 80 is contrary to and in breach of which Rule. It may be mentioned that the scope of judicial review in respect of assessment of merits of the candidates made by the selection committee is very limited. As held by the Supreme Court in the case of DALPAT ABASAHEB SOLUNKE etc. etc. (supra) it is not the function of the Court to hear appeals over the decisions of the selection committees and to scrutinize the relative merits of the candidates. The Supreme Court has ruled that whether a candidate is fit for a particular post or not has to be decided by the duly constituted committee which has the expertise on the subject and the Court has no such expertise. What is emphasised is that the decision of the selection committee can be interfered with only on limited grounds such as illegality or patent material irregularity in the constitution of the committee or its procedure vitiating the selection or proved malafides affecting the selection etc. Here, in this case all the eligible candidates were given opportunity to compete with each other.

22. In LILA DHAR v. STATE OF RAJASTHAN, (1981) 4 SCC 159, the Supreme Court has held that there cannot be any rule of thumb regarding the precise weight to be given and that it must vary from service to service according to the requirements of the service, the minimum qualifications prescribed , the age group from which the selection is to be made, the body to which the task of holding the interview test is proposed to be entrusted and a host of other factors. The Supreme Court said that it was a matter for determination by experts and also a matter for research and that it was not for the Court to pronounce upon it unless exaggerated weight is given with

proven or obvious oblique motives. In the present case, post of Section Officer is a selection post. The selection committee consisted of two learned senior Judges of High Court well-versed with the requirement of the post to which promotion was to be made. Norms had been laid down for the selection committee to follow in Rule-47(2) of the Rules. Apart from the objection that marks have not been allocated for the past performance, the original petitioners have been unable to point out any illegality or irregularity in the selection process. It is not for the Court to suggest as to whether any marks should be allocated for the past performance in a case like the present one. We are, thus, of the opinion that the selection made was according to the rules.

In such matters, Court does not exercise jurisdiction akin to the appellate jurisdiction against the decision taken by the competent authority so long the competent authority has acted on the principles of fairness and fair play. In R.S.DASS v. UNION OF INDIA AND OTHERS, 1986(Supp) SCC 617, it is ruled that where promotion is made on the basis of seniority, the senior has preferential right to promotion against his juniors, but where promotion is made on merit alone and eligible officers are considered on merits in an objective manner, no government servant has any legal right to insist on promotion nor any such right is protected by the Article 14 or 16, except that he has only right to be considered along with others. What is emphasised therein is that where power is vested in high authority, there is a presumption that the same would be exercised reasonably.

In ORISSA SMALL INDUSTRIES CORPN.LTD. AND ANOTHER v. NARASINGHA CHARAN MOHANTY AND OTHERS, (1999)1 SCC 465, promotion to the post of General Manager was governed by Rule-24 of the Employees Service Rules, 1979. Under the said rule, selection committee was required to recommend suitable employee for promotion whom they considered fit. The respondent was considered for promotion to the said post, but was not promoted, as he was not found suitable. The criteria for promotion was merit and suitability. The Supreme Court has held that Court is not entitled to assess respective merits of the candidate for adjudging their suitability for being promoted and the only right the employee has is a right of consideration. The Supreme Court further held that said right of consideration not having been infringed, the High Court was not justified in issuing direction for reconsideration of the case of the respondents.

In DURGA DEVI AND OTHERS v. STATE OF H.P. AND OTHERS, (1997) 4 SCC 575, respondent no.4 challenged appellants' appointment, inter-alia, on the ground that he was academically more meritorious than the appellants and, therefore, selection committee was not justified in preferring the appellants in selection. The State Administrative Tribunal allowed the application filed by the respondent no.4. While quashing the order of the Tribunal, the Supreme Court has held that the Tribunal fell in error in arrogating to itself the power to judge the comparative merits of the candidates and consider the fitness and suitability for appointment. According to the Supreme Court, that was the function of the selection committee and, therefore, the order of the Tribunal was liable to be set aside.

Though it was not averred in the petition that the past record was not taken into consideration by the selection committee, it was averred in the affidavit-in-reply filed on behalf of the High Court that service records of all the candidates were placed before the selection committee and those records were considered. This statement made in the affidavit-in-reply is not controverted by the original petitioners in the affidavit-in-rejoinder. The fact that service records were called for and were placed before the selection committee is not in dispute and, therefore, it would be reasonable to presume that service records were considered by the selection committee. However, non-assignment of marks would not indicate that the selection was made by the selection committee in an arbitrary manner. Rule-47(2) of the Rules is, in our view, complied with and there has been no material indicating irregularity or illegality committed by the selection committee when it did not indicate separate marks for past performance. As pointed out earlier, merits has to be assessed on the basis of past performance, written test and oral test. When a candidate has to appear at written and oral test his merits can be ascertained with reference to marks obtained by him at the tests. However, no test is being held for past performance and what is required to be done is to scrutinise and examine the past record for which assignment of marks may not be necessary in all cases. What procedure should be adopted for assessing merits while considering, three criterions has to be left to the selection committee and it is not open to the Court hearing a petition under Article 226 of the Constitution to lay down that a particular procedure ought to have been adopted by the selection committee. No conclusion is possible that in absence of allotment of separate

marks for past performance, Rule 47(2) stands breached. The factum of service record being before the Committee, is not disputed, but what is objected is that consideration is not reflected in the sense of allotment of separate marks. The fact that service record is considered is evident from another fact that two candidates having adverse remarks were also considered. The record indicates that same norms and same yard-stick have been applied by the selection committee to all the candidates. There is no dispute that the tests- both oral and written were fair except non-grading of past experience. No bias is alleged in this case against the members who constituted the selection committee. The record does not indicate that undue advantage was given to any of the selectees. Therefore, we are of the firm opinion that the selection is free from arbitrariness. The submission made by Dr. Sinha, learned Counsel for the respondents that having regard to the judgments cited at the bar, marks allotted to past records should have been 50% minimum, cannot be accepted. It is also difficult to accept the submission that because of non-assignment of marks, arbitrariness has crept into consideration made by the selection committee. In each case cited by Dr. Sinha, assessment of merits was required to be made on examination of record and there were guidelines which required the authorities to assess the record. Moreover, in no case cited, there was provision to hold written test. It may be stated that when the merit is the sole basis for promotion, selection of juniors for promotion does not amount to supersession and superseded officer has no right to claim place in the select list. Under the present rules, it is for the selection committee to devise its methodology for adjudging merits of the candidates on the basis of three considerations. In STATE BANK OF INDIA AND OTHERS v. MOHD. MYNUDDIN, 1987(4) S.L.R. 383 it is held by the Supreme Court that methodology for assessing merits of the candidates has to be left to the selection committee and the Court has to examine whether methodology is arbitrary in context of candidate. Though the decision cited at the bar by the learned Counsel for the contesting respondents indicates that in some cases as per instructions or relevant rules, 50% marks were assigned for past performance, it is not laid down that there should be marking or scoring for past performance in every case of selection on merit. It is clear from the reading of Rule 47(2) of the Rules that the post of Section Officer is the selection post. As observed earlier, the said rule provides that selection for the post of Section Officer has to be made on the basis of written test, viva voce and past record. The rule itself

does not provide any allocation of marks for such different heads. The said rule and the procedure is known to all including candidates who participated in selection process in question. After having participated in the selection process and failed, the unsuccessful candidates have challenged the selection, which in our view, is contrary to the two judgments of the Supreme Court rendered in the cases of (1) OM PRAKASH SHUKLA v. KUMAR SHUKLA & ORS., AIR 1986 S.C. 1043, and (2) MADAN LAL AND OTHER v. STATE OF JAMMU AND KASHMIR AND OTHERS, AIR 1995 S.C. 1088. While considering this point, the Supreme Court in UNION OF INDIA AND ANOTHER v. N.CHANDRASEKHARAN AND OTHERS, 1998 SCC (L & S) 916, has observed, "It is not in dispute that all the candidates were made aware of the procedure for promotion before they sat for the written test and before they appeared before the Departmental Promotion Committee. Therefore, they cannot turn around and contend later when they found they were not selected, by challenging that procedure and contending that the marks prescribed for interview and confidential reports are disproportionately high and that the authorities cannot fix a minimum to be secured either at interview or in the assessment on confidential report." In this case also, selection is pursuant to the rule which is known to all wherein exact marks or the weightage for past record has not been prescribed. All the candidates were aware of this rule and procedure for promotion before they sat for written test and before they appeared for viva voce before the selection committee. Therefore, they cannot turn around and contend later when they found that they were not selected by challenging the procedure adopted by the selection committee or ultimate selection made by the selection committee. Under the circumstances, challenge to the selection should fail on this count alone. At this stage, it would be advantageous to refer to one epoch making judgment of the Supreme Court rendered in S.P.BISWAS AND OTHERS. v. STATE BANK OF INDIA, AIR 1991 S.C. 2039. The Supreme Court has, inter-alia in para-4 of the said judgment held, "Of the several heads under which the marks are divided for promotion to Merit Channel, written test and interview are the only ones which depend on the current performance. The marks under the remaining three heads of seniority, performance appraisal and C.A.I.I.B. (passing of examination held by Bank's Institute) relate to past performance of the candidate which are matters of record. It is, therefore, the appraisal of the current performance by written test and interview which alone is the real part of a proper appraisal of the current performance of the candidate for the purpose of assessing his merit for promotion through

the Merit Channel. In this situation, if the marks obtained in the written test alone are taken into account for preparing the Select List to call candidates for an interview depending upon the number of vacancies available in Merit Channel, the criterion adopted cannot be termed arbitrary. As earlier indicated, the marks obtained for seniority, performance, appraisal and C.A.I.I.B. are based on service record and not on appraisal of the candidate by a mode independent of service record for assessing the true current worth of the candidate." In view of the authoritative pronouncement of law made by the highest Court of the land in the above referred to decision, challenge to the selection on the ground that marks are not allotted to past record and, therefore, selection is bad, must fail, more particularly when selection committee in the present case had taken into consideration past performance of the candidates. It would also be instructive to refer to the judgment rendered by this Court (Coram : P.D.Desai, J. as he then was) in Special Civil Application No. 1272 of 1980 decided on September 1, 1980 in almost identical matter. Therein the petitioner who was employed in the post of Assistant on the establishment of Gujarat High Court, had complained about his supersession in the matter of promotion to the post of Section Officer. The promotion to the post of Section Officer was governed by Rule 38(2) of the old Rules of 1964, which was as under :-

"38(2): The post of Superintendent and any higher post shall be considered as selection post and no court servant shall have a claim to them merely by way of seniority"

Thus, for promotion to the post of Section Officer, merit alone was the sole criterion. The Registrar of the High Court had filed a reply to the petition pointing out that in accordance with the policy consistently followed, the cases of all eligible Assistants including the petitioiner, were considered on the basis of confidential reports. In all, cases of 13 Assistants were considered on the basis of confidential reports and 10 out of them including the petitioner, were selected to appear at the written test and personal interview. The final selection was made on the basis of performance at the written test and personal interview. In the course of his affidavit, the Registrar had also referred to the past record of the petitioner and the Registrar had made it clear that the decision not to select the petitioner was taken on the basis of his performance at the written test and personal interview.

The learned Single Judge observed that grievance of the petitioner as articulated at the hearing was that appointment to a selection post could not be made solely on the basis of written and oral test and it should have been made on the basis of overall consideration of several factors. While rejecting the petition, the learned Single Judge held as under :-

"There is no substance in this grievance. The process of selection, in the instant case, was spread over two stages as is apparent from the affidavit-in-reply filed by the Registrar. There was initial screening of the eligible candidates on the basis of the confidential records. The confidential records would ordinarily contain all material information with regard to a candidate. It would reflect the number of years of service and the quality of service. The service record would also indicate the qualifications and other material factors. The petitioner, at the first stage of selection, was found to be eligible for being called for the written and oral test. In other words, on the basis of his confidential and service record, he was successful at the first stage of selection. It is at the second stage of the process of selection that the petitioner failed to measure up to the required standard. It would not be correct to say, therefore that the selection was solely on the basis of the performance at the written and oral test. There was an overall balance evaluation and all the relevant factors entered into account. The method of selection cannot be said to be arbitrary or irrational. Under such circumstances there is little scope for intereference. No other allegation has been made against the recruiting authority."

Against the above-referred to judgment, Letters Patent Appeal No.159/80 under Clause 15 of the Letters Patent was filed by the original petitioner, which was also rejected by judgment dated September 15, 1980. Applying the principle laid down in the above-quoted unreported decision, we are of the opinion that the selection in the present case cannot be held to be arbitrary or illegal in any manner.We are satisfied that procedure for promotion from the post of Assistant to the post of Section Officer as enjoined in Rule-47 is scrupulously followed and strictly complied with. In our considered view, the learned Single Judge was not right

in concluding that there was no objective evaluation of merits by the selection committee. The learned Single Judge was also not right in concluding that selection committee should have adopted the procedure of awarding marks for past records of the candidates. In such type of selection, what is required is dispassionate and objective selection, but not arbitrary or colourable selection. When the learned Chief Justice nominated two learned senior sitting Judges of the High Court to constitute the selection committee and the selection committee selected Section Officers on objective tests, there emerges no arbitrary selection. Generally courts do not interfere with the selection when consideration of relevant criterion is left to the expert body. What is objective criteria is the question of fact in each case and each case depends upon its own facts and circumstances in which respective claims of competing candidates come-up for consideration. No absolute rule in that behalf can be laid down. Each case is required to be considered on its own merits and on its spirit giving due consideration to the view expressed by the members of the expert committee in the affairs of selection of the candidates. In our view, as original petitioners have failed to point out any arbitrariness in the selection, challenge on the ground of breach of Rule-47(2) cannot be sustained and should fail. The learned Single Judge was not justified in setting aside selection of all the candidates on the ground that there was breach of Rule-47(2) of the Rules and, therefore, the said finding is hereby reversed.

23. Dr. Sinha, learned Counsel for the contesting respondents pleaded that the learned Single Judge was not justified in holding that short-listing of candidates at the stage of viva voce was not illegal. According to the learned Counsel, all the candidates within the zone of consideration have fundamental right of being considered for promotion and when promotion is to be granted on the basis of three criterions mentioned in Rule-47(2) of the Rules, not calling the petitioners of Special Civil Application No. 351/98 for oral interview is not only bad in law, but has vitiated the whole selection. We may state that this plea has been dealt with by the learned Single Judge in Para-25 of the impugned judgment. The selection committee had followed the procedure of holding written test of 60 marks followed by oral test of 20 marks and the criteria adopted for the selection was that the candidate who scored 40% marks in aggregate should be considered eligible for section. Therefore, to be eligible for selection a candidate was required to obtain minimum 32 marks out of 80 in aggregate at the written as

well as oral tests. However, it was found that several candidates had obtained less than 11 marks at the written test and on submission being made, the selection committee directed that those who had secured less than 11 marks at the written test shold not be called for oral test because even if 20 marks were secured at the oral test by those candidates, the total would not be 40% marks. We find that since the oral test was of 20 marks, even if a candidate securing 11 marks at the written test was given full 20 marks, he would not reach the qualifying standard of 32 marks out of 80 and, therefore, only such of the candidates who had secured 12 or more marks at the written test, were called for oral test.In our view, this cannot be said to be illegal at all. It would have been an exercise in futility to call those candidates for interview who had secured less than 12 marks at the written test. In Ashok Kumar Yadav and others (supra), the selection was on the basis of performance at the written test and viva voce. A candidate obtaining 45 marks in written test was eligible to appear for oral interview, but some candidates who had secured 45 marks, were not called for interview. The question before the Supreme Court was whether short-listing done by Haryana Public Service Commission was legal. This plea has been considered by the Supreme Court in Para-20 of the reported judgment and it is held that there was no obligation on the Commission to call for interview all candidates securing 45 marks in written test. What is emphasised is that it was open to Haryana Public Service Commission to say that out of the candidates who satisfy the eligibility criterion of minimum 45 marks in the written examination only a limited number of candidates at the top of the list, would be called for interview. The reason given by the Supreme Court for justifying the short-listing is that if a viva voce test is to be carried out in a thorough and scientific manner as it must be in order to arrive at a fair and satisfactory evaluation of the personality of a candidate, the interview must take anything between 10 to 30 minutes and, therefore, short-listing is permissible. Again, in the case of MADHYA PRADESH PUBLIC SERVICE COMMISSION v. NAVNIT KUMAR POTDAR AND ANOTHER, AIR 1995 S.C. 77, the Supreme Court has observed that process of short-listing does not amount to altering or substituting the eligibility criteria given in statutory rules or prospects and in substance and reality, this process of short-listing is part of process of selection. In view of the principles laid down by the Supreme Court in the above quoted decisions, we are of the opinion that not calling candidates who had secured less than 12 marks at the written test for oral interview is not illegal in any

manner and the learned Judge was justified in negativing said plea.

24. Dr. Mukul Sinha, learned Counsel for the contesting respondents vehemently contended that all the candidates from serial nos. 65 to 91 were not eligible, as they had no experience of 5 years in the post from which they were to be promoted on the date when vacancies arose and, therefore, the whole selection was vitiated. The learned Counsel for the contesting respondents complained before the Court that this point is dealt with in a perfunctory manner by the learned Single Judge and having regard to the disqualification of the candidates, the whole selection should be struck down. It was further pointed out that Ms. Sujitra Rajan i.e. respondent no.41 in Letters Patent Appeal No.1426/98 had passed departmental examination as prescribed in July 1997 and, therefore, she could not have been considered for promotion, as she was ineligible. In our view, there is no substance in any of the above-referred to contentions and the selection is not liable to be struck down on the ground that ineligible candidates were considered for selection. In Mrs. Rekha Chaturvedi vs. University of Rajasthan & Ors., Judgment Today, 1993(1) S.C. 220, it is held that in absence of fixed date indicated in the advertisement, only certain date for scrutiny of qualification would be last date for making application. In the said case, the selection committee had taken into consideration requisite qualification as on the date of selection rather than on the last date of preferring the applications. The Supreme Court held that selection committee acted with patent illegality and on that ground, the selections were liable to be quashed. Again, in Ashok Kumar Sharma and others (supra), it is held that eligibility of candidates has to be judged with reference to the date by which the application is to be filed and any person who acquired the prescribed qualifications subsequent to such prescribed date, cannot be considered at all. Same principle is enunciated by the Supreme Court in (1) STATE OF HARYANA AND OTHERS v. ANURAG SRIVASTAVA & ORS., JUDGMENT TODAY, 1998(9) SC 190 and (2) MILLS DOUGLAS MICHAEL AND OTHERS v. UNION OF INDIA AND OTHRS, JUDGMENT TODAY 1996(4) S.C. 189. In view of the well settled principle of law enunciated in the above-referred to decisions, it is clear that eligibility has to be ascertained with reference to last date for making application. Even Rule 47(4) of the Rules also does not contemplate that eligibility criteria should be satisfied with reference to date of vacancies. A reasonable reading of Rules 47(4) and 47(5) of the Rules makes it clear that the criteria for determination

of eligibility is last date of making application. In the light of this well settled principle, the question whether the candidates who were enlisted at serial nos. 65 to 91 can be said to be ineligible, has to be considered. It is an admitted position that before the last date of making application, all the candidates including respondent no.41 in Letters patent Appeal No.1426/98 had attained eligibility and, therefore, it is difficult to agree with the submission of the learned Counsel for the respondents to the effect that selection was vitiated as ineligible candidates were considered for promotion. In Para-9 of the Office Submissions names of officers concerned have been shown and date of promotion as Assistants as well as year of passing H.S.D.E. is also mentioned. Therefore, all were eligible for being considered and their consideration cannot be said to be bad at all.

25. It was next contended that Mrs. Gracy S.T. who is respondent no.43 in Letters Patent Appeal No.1426/98 had not completed 5 years of qualifying service as an Assistant,as she had taken leave without pay for pretty long time and had also not completed graduation, as a result of which she could not have been considered for promotion. Mrs. Gracy S. Thomas has filed affidavit-in-reply in Special Civil Application no.1298/98. The said reply forms part of record of Letters Patent Appeal No. 1429/98. In her reply she has stated that she was directly selected as a Clerk in October, 1988 and while she was working as a Clerk, she had taken leave without pay from March 30, 1990 to July 2, 1991 totalling 230 days. She has mentioned that thereafter in accordance with Recruitment Rules of Assistants, she was promoted as an Assistant on May 6, 1992 and in the post of Assistant, she had only taken Leave Not Due under Rule 736(C) of the Bombay Civil Services Rules for 23 days i.e. from October 16, 1996 to November 7, 1996. She has elaborated that the same was half pay leave to be adjusted subsequently in accordance with the Bombay Civil Services Rules. She has also averred that thereafter she had taken leave without pay in the year 1997 only for 17 days i.e. from March 13, 1997 to March 21, 1997 and from May 13, 1997 to May 20, 1997. There is no manner of doubt that she had taken only 23 days of half pay leave and 17 days leave without pay to which she was entitled to under the relevant rules. She further stated that she passed departmental examination of Assistants in the January, 1992, result of which was declared in April 1992 and thereafter she was selected as an Assistant. She has also asserted that she passed her Bachelor examination in the year 1990 and had

given intimation thereof to the department.

It may be stated that no rejoinder has been filed by the original petitioners to the affidavit-in-reply of Mrs. Gracy S. Thomas. Thus, it becomes evident that on incorrect facts, her selection was sought to be challenged. Her affidavit-in-reply makes it abundantly clear that she had completed five years' qualifying service as an Assistant and also passed her graduation in the year 1990. Thus, the original petitioners are not right when they contend that her selection was bad, as she was ineligible for consideration and yet was considered by the selection committee.

26. The next point which has been urged on behalf of the original petitioners is that Rule 47(2) itself is not just, fair, scientific and proper, inasmuch as said rule wholly negates the principle of seniority and thereby negates the experience gained by the Assistants in their respective spear of work and, therefore, is contrary to the principles laid down in Article 14 of the Constitution. It was submitted that promotion from the post belonging to Class-III to Class-II post ought not to have been made purely on proven merits and the post of Section Officer ought not to have been considered as selection post. What was claimed was that while merits gets due weightage, seniority should also be given equal weightage and as promotion policy does not take into account peculiar nature of work done by the Assistants, promotion policy enunciated in Rule 47(2) of the Rules is arbitrary. It was also pleaded that work of Section Officer cannot be said to be of such a nature which would warrant that all such posts should be made selection posts and, therefore, Rule-47(2) having negated the principle of seniority, it should be struck down as arbitrary.

As against that, Mr.S.N.Shelat, learned Additional Advocate General submitted that the post of Section Officer is a senior post and, therefore, if the Chief Justice has prescribed the criteria of merit, it cannot be said to be arbitrary in any manner. In support of this submission, learned Addl. Advocate General placed reliance on the decision rendered in the case of GUMAN SINGH v. STATE OF RAJASTHAN AND OTHERS, 1971(2) S.C.C. 452.

Having heard the learned Counsel for the parties on the point, we are of the opinion that Rule 47(2) is not liable to be struck down on the ground that it is arbitrary. The object of introducing the idea of merit

in the procedure of promotion as is evident from Rule 47(1) and Rule 47(2) of the Rules is to serve public interest and not personal interest of the official group concerned. It hardly needs to be emphasised that post of Section Officer is a senior post and the officer manning the said post heads a particular section of the High Court. Whether the criteria for promotion to the post of Section Officer ought to have been merit-cum-seniority or merit alone is the subject of decision by the Chief Justice and such a question cannot be gone into by the Court while hearing a petition under Article 226 of the Constitution. Even otherwise,it hardly needs to be emphasised that merit should be given adequate weightage in the matter of promotion especially for senior appointments to ensure greater efficiency in functioning of High Courts and also to provide adequate incentive to servants of Courts to give their best. Therefore, criteria for promotion as introduced in Rule-47(2) cannot be regarded as arbitrary. The argument that Rule 47(2) of the Rules is vague and does not give any guideline in assessing the merits of the officer and, therefore, should be struck down, has also no merits. No doubt, the term 'merit' is not capable of an easy definition, but it can be safely said that merit is a sum total of various qualities and attributes of an employee such as his academic qualifications, his distinction in the University, his character, integrity, devotion to duty and the manner in which he discharges his official duties. Allied to this may be various other matters, or factors, such as his punctuality in work, the quality and out-turn of work done by him and the manner of his dealings with his superiors and subordinate officers and the general public, his rank in the service and annual confidential report. All these and other factors may have to be taken into account in assessing the merit. Therefore, it cannot be said that Rule-47(2) of the Rules is vague or does not give any guideline for assessing merits of the officer. It may be mentioned that sufficient guidelines for assessing merits of an officer are provided in Rule-47(2) of the Rules, inasmuch as selection committee has to assess merits on the basis of performance of the candidates at the written as well as oral tests and also on the basis of past performance. Therefore, it is very difficult to conclude that no guidelines are laid down for assessing merits of an officer. While a written examination assesses the candidate's knowledge, drafting capacity for clear and logical presentation etc. the viva voce test seeks to assess a candidate's initiative, alterness, resourcefulness, effectiveness in discussion, effectiveness in meeting and dealing with others,

adaptability, judgment, ability to make decision etc. All these known factors are required to be taken into consideration by selection committee while judging merits of the candidates. Failure to implement criterions mentioned in Rule-47(2) may, in a given case, lead to conclusion that the promotion is made without properly applying the criterions and therefore, is bad. But, that does not mean that Rule-47(2) itself is bad as being arbitrary. For these reasons, we are of the view that Rule-47(2) of the Rules is not liable to be struck down on the ground that it is arbitrary as contended by the original petitioners. The said contention, therefore, fails and is rejected.

27. The last contention that promotion effected is not on merits, as candidates getting higher marks are placed below in the select list, has no substance. The Rules provide for selection on merits, but do not provide for question of fixing inter-se seniority of the selected candidates on the promotional post. When the candidates getting highest marks are included in the select list to match existing vacancies, merit criteria is satisfied. The question then is as to how should their seniority be fixed ? Having regard to the fact that all the selected candidates satisfied merit criteria, it would not have been proper to disturb their inter-se seniority in the promotional post, which is only Class-II post because it was likely to generate sense of heart burning amongst senior employees, who had also proved their merits. Under the circumstances, after making selection, inter-se seniority of the candidates is maintained. This cannot be said to be illegal at all. Merely because inter-se seniority of the candidates is maintained and some who had secured more marks are placed below in the select list, it would not be correct to jump to the conclusion that criteria of merits was not adhered to while making selection. Therefore, we do not find any substance in this plea and it fails.

28. These are the only grounds which were advanced by Dr. Mukul Sinha, learned Counsel appearing for the original petitioners. No other contention was urged in support of original petitions. As we have come to the conclusion that the learned Single Judge was not justified in annulling the selection on the ground that the zone of consideration was illegally widened by the Chief Justice and there was no evaluation of past performance by the selection committee, and as we have held that there is no merits in other points urged by Dr. Mukul Sinha, learned Counsel for the contesting respondents, all the appeals will have to be allowed.

For the foregoing reasons, all the above-referred to Letters Patent Appeal are allowed and the common judgment rendered by the learned Single Judge in Special Civil Application No. 351/98 and Special Civil Application No. 1298/98 is hereby set aside. Special Civil Application No. 351/98 which was filed by those who were not called for interview and Special Civil Application No. 1298/98 which was filed by those officers who had appeared at the oral interview, but were not selected stand dismissed. There shall be no orders as to costs.

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(patel)